

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 416 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgement?-No.
2. To be referred to the Reporter or not?-No. :
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?-No.
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?-No.
5. Whether it is to be circulated to the Civil Judge?-No. :

CHANDRAKANT DHANJIBHAI THAKKAR

Versus

SATYAPRAKASH DEVIPRASAD SWAMI

Appearance:

MR RN SHAH for Petitioner

MR AV PRAJAPATI for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE

Date of decision: 01/11/1999

ORAL JUDGEMENT

Admit.

Learned Advocate Shri Prajapati waives service,
and at the request of the learned Advocates, the appeal
is finally heard today.

The appellant-defendant has challenged validity
of order passed in Civil Miscellaneous Application No.368

of 1998 in Summary Suit No.5331 of 1997, whereby the application filed by the appellant-defendant for setting aside the ex parte decree dated 27th March, 1998, in the aforesaid suit was rejected.

At the time of hearing of this appeal, learned Advocate Shri R.N. Shah has submitted that the summons could not be served to the defendant for the reason that at the time when the summons was sought to be served upon the defendant, the defendant being a Cardiac patient, had undergone a major operation, at Bombay, and, therefore, he was not available at his residence. In view of the circumstances, referred to hereinabove, though the summons was affixed at his residence, the defendant could not know about service of the summons and could not take appropriate steps to defend himself. It has been further submitted that even the wife of the defendant is suffering from a malignant disease and, therefore, it was also not possible for her to take an appropriate action for defending the suit.

Looking to the peculiar facts and circumstances of the case, especially in view of the fact that it is not in dispute that the defendant had undergone a major surgery at Mumbai at the time when the summons was affixed at his residence, it is clear that the defendant could not defend himself and in the circumstances, ex parte decree was passed against him in Summary Suit No.5331 of 1997.

Thus, there appears to be a case for setting aside the said ex parte decree, but looking to the facts of the case, it would be proper to impose some condition upon the appellant-defendant before he is permitted to defend the suit.

After hearing the learned Advocates and looking to the facts of the case, it is directed that a sum of Rs.40,000/- shall be deposited by the defendant in the trial court on or before 31st December, 1999. It would be open to the original plaintiff to withdraw the said amount after taking permission of the trial court. The said amount shall be deposited without prejudice to the rights and contentions, which might be raised by the defendant in the suit.

In view of the above direction, the appeal is allowed and ex parte decree passed in Summary Suit No.5331 of 1997 dated 27th March, 1998 is quashed and set aside on the condition that the appellant-defendant deposits Rs.40,000/- before 31.12.1999 with the trial

court.

The appeal is allowed with no order as to costs.

(apj)